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No. 404.

Brief of Wilson for D. E.  
IN THE

Supreme Court of the United States.

Filed Feb. 25, 1898.

THE UNITED STATES *ex rel.* ALFRED BERNARDIN, Plaintiff in Error,

*vs.*

BENJAMIN BUTTERWORTH, Commissioner of Patents.

No. 404.

**In re Motion to Substitute Hon. C. H. Duell,  
Present Commissioner of Patents, as Defendant in Error in Place of the Hon. Benjamin Butterworth, Deceased.**

An inspection of the record will show that this case grows out of a contest between the said Alfred Bernardin and one Northall, in relation to the issuance of a patent upon a device for corking and sealing bottles. Which of the two was entitled to the patent was the subject-matter of contest on a declaration of interference, and afterwards on appeal in the Court of Appeals of the District of Columbia.

The Court of Appeals held that Northall was entitled to the patent, notwithstanding which decision Bernardin instituted proceedings for mandamus to compel the Commissioner of Patents to issue the patent to him. During the pendency of the case in this court, the Commissioner of Patents, the Hon. Benjamin Butterworth, died, and Mr. Duell was appointed his successor. The present motion is to substitute Mr. Duell for the former Commissioner.

It is submitted that by reason of the death of Mr. Butterworth the action has abated, and that it can not be revived as against the present Commissioner.

As my client, the Crown Cork and Seal Company, is not a party to the record, although the real party in interest adverse to the contention of the plaintiff in error, as I stated in open court, I will content myself with stating this proposition, to wit, that this record presents a case where the writ is aimed against a person and not against an office. It is in its nature a personal action, and rests upon the allegation that the performance of a personal duty has been refused.

*United States v. Boutwell*, 17 Wall., 604.

As stated in the opinion of Justice Gray in the case of *Warner Valley Stock Co. v. Smith* (165 U. S., 28, 31)—

“That a petition for a writ of mandamus to a public officer of the United States abates by his resignation of his office has been determined by a series of uniform decisions of this court, and has for years been considered

so well settled that in some of the cases no opinion has been filed and no official report published.

*Secretary v. McGarrahan*, 9 Wall., 298, 313 ;

*United States v. Boutwell*, 17 Wall, 604, 609 ;

*Commissioners v. Sellew*, 99 U. S., 626 ;

*United States v. Schurz*, 102 U. S., 378, 408 ;

*Thompson v. United States*, 103 U. S., 480, 484 ;

*United States v. Chandler*, 122 U. S., 643 ;

*United States v. Lamont*, 155 U. S., 303, 306 ;

*United States v. Long*, 164 U. S., 701."

I, therefore, submit that the motion of the plaintiff in error should be overruled.

J. M. WILSON,

*Attorney for the Crown*

*Cork and Seal Co.*